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IN THE

Supreme Court of the United States

JOHN ASHCROFT, ATTORNEY GENERAL OF THE UNITED STATES, ET AL.,

Petitioners,

vs.

THE FREE SPEECH COALITION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

Motion for Leave to File Brief Amici Curiae And Brief Amici Curiae of Hons. Sam Brownback, Robert Aderholt, Richard K. Armey, Bob Barr, Michael Collins, Randy Cunningham, Jeff Flake, Melissa Hart, Duncan L. Hunter, Henry J. Hyde, Ernest Jim Istook, Jr., Walter B. Jones, Jr., Steve Largent, Charles Pickering, Joseph R. Pitts, Bob Riley, Ileana Ros-Lehtinen, and J. C. Watts Supporting Petitioners

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Senator Sam Brownback (KS), a member of the United States Senate, and Congressmen Robert Aderholt (AL-4), Richard K. Armey (TX-26), Bob Barr (GA-7), Michael Collins (GA-3), Randy Cunningham (CA-51), Jeff Flake (AZ-1), Melissa Hart (PA-4), Duncan L. Hunter (CA-52), Henry J. Hyde (IL-6), Ernest Jim Istook, Jr. (OK-5), Walter B. Jones, Jr.

(NC-3), Steve Largent (OK-1), Charles Pickering (MS-3), Joseph R. Pitts (PA-16), Bob Riley (AL-3), Ileana Ros-Lehtinen (FL-18), and J. C. Watts (OK-4), each a member of the United States House of Representatives, respectfully moves this Honorable Court for leave to file the attached brief *amici curiae* in support of the petitioners in the above-captioned case.

The consent of counsel for the petitioners has been obtained. The consent of counsel for the respondents was requested but refused without explanation.

Each of the amici currently serves in the One Hundred Seventh Congress. These amici support the enactment of strict measures to curb the proliferation of child pornography. Because today's youth represent the future of our great nation, these amici believe that extensive efforts must be undertaken to shield and protect children from the type of serious harm caused by their sexual exploitation.

Amici take the position that child pornography is unprotected speech and deserves no First Amendment protection, even when such materials are produced using highly sophisticated computer technology. Given the pernicious, harmful effects on children and on society that child pornography and its peddlers cause, amici support great leeway for Congress regarding its regulation. The Child Pornography Protection Act seeks to eradicate the trafficking in child pornography in a manner that is both necessary and constitutionally permissible. The appropriate resolution of this case is a matter of substantial importance to these amici and their constituents.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

This brief is filed on behalf of Senator Sam Brownback (KS), a member of the United States Senate, and Congressmen Robert Aderholt (AL-4), Richard K. Armey (TX-26), Bob Barr (GA-7), Michael Collins (GA-3), Randy Cunningham (CA-51), Jeff Flake (AZ-1), Melissa Hart (PA-4), Duncan L. Hunter (CA-52), Henry J. Hyde (IL-6), Ernest Jim Istook, Jr. (OK-5), Walter B. Jones, Jr. (NC-3), Steve Largent (OK-1), Charles Pickering (MS-3), Joseph R. Pitts (PA-16), Bob Riley (AL-3), Ileana Ros-Lehtinen (FL-18), and J. C. Watts (OK-4), each of whom is a member of the United States House of Representatives. Each of the amici currently serves in the One Hundred Seventh Congress. These Congressman and Senators support the enactment of strict measures to curb the proliferation of child pornography. Because today's youth represent the future of our great nation, these amici believe that extensive efforts must be undertaken to shield and protect children from the type of serious harm caused by their sexual exploitation.

The amici Congressmen and Senator have dedicated time and effort to defending and protecting children. It is this commitment to the defense of children that compels them to support the stringent regulation of child pornography. Amici take the position that child pornography, even as generated by

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1. Counsel for the petitioners consented to the filing of this brief; a letter of consent has been filed with the Clerk of Court pursuant to Rule 37; counsel for the respondents has denied consent. Pursuant to Rule 37.6, amici disclose that no counsel for any party in this case authored in whole or in part this brief and that no monetary contribution to the preparation of this brief was received from any person or entity other than *amici curiae*.

current computer technology, is unprotected speech and deserves no First Amendment protection. Given the pernicious harmful effects both to children and to society as a whole that child pornography and its peddlers cause, Congress should be given great leeway regarding its regulation. The Child Pornography Protection Act seeks to eradicate the trafficking in child pornography in a manner that is both necessary and constitutionally permissible. Amici, therefore, urge this Court to reverse the erroneous decision of the United States Court of Appeals for the Ninth Circuit.

SUMMARY OF ARGUMENT

In *New York v. Ferber*, 458 U.S. 747 (1982), this Court held that child pornography is outside the scope of the First Amendment. Because child pornography is not entitled to protection under the First Amendment, it may be regulated regardless of whether it would otherwise be considered obscene under *Miller v. California*, 413 U.S. 15 (1973). In this important respect, judicial determination of challenges to the constitutionality of federal statutes criminalizing child pornography, its creation, its possession, and its use, are categorically different from the analysis brought to bear on pornography depicting adults.

Six years after the *Ferber* decision, Congress found that electronic bulletin boards and other precursors of the Internet had become a popular medium for trafficking in child pornography. In response, Congress outlawed the use of computers to transport, distribute, or receive such materials. *See* Child Pornography and Obscenity Enforcement Act of 1988, Pub L. No. 100-690, 102 Stat. 4485 (1988); 18 U.S.C. §§2251-2256. Despite Congress' effort, by 1996, law enforcement officials reasonably concluded that pedophiles and others had discovered a loophole in the definition of "child

pornography." Using enhanced computer technology, pedophiles and others were exploiting that loophole to create, distribute and use *virtual* images of child pornography.

Specifically, *virtual* child pornography involves the creation of computer generated images, often "morphed" from actual photographs, depicting children engaged in sexual conduct. These images are indistinguishable from actual photographs of real children. Spurred by clear and substantial evidence that *virtual* child pornography was used by pedophiles to seduce children into sexual behavior, Congress enacted the Child Pornography Prevention Act of 1996 ("CPPA"). *See* 18 U.S.C. §2251 Notes Cong. Findings, Section 101(a)(8). Through the CPPA, Congress amended the definition of "child pornography" to include "any photograph, film, video, picture, or computer or computer generated image or picture" where:

> (A) the production of such visual depiction involves the use of a minor engaging in sexually explicit conduct;
> (B) such visual depiction is, or appears to be, of a minor engaging in sexually explicit conduct;
> (C) such visual depiction has been created, adapted, or modified to appear that an identifiable minor is engaging in sexually explicit conduct;
> (D) such visual depiction is advertised, promoted, presented, described, or distributed in such a manner that conveys the impression that the material is or contains a visual depiction of a minor engaging in sexually explicit conduct.

18 U.S.C.2256(8).

Congress acted within its authority, and without derogation of any conceivable First Amendment value, in closing the loophole in federal law that had become the refuge of *virtual* child pornographers. As explained in Argument I, child

pornography is *sui generis*. Unlike pornography depicting adults, child pornography is, categorically, outside of the ambit of the First Amendment. Moreover, Congress has concluded that the interest embodied in the CPPA – the protection of children from abuse, degradation, and perversion – is of the highest order. Consequently, even if there were something about *virtual* child pornography that enjoyed any degree of constitutional protection (and there is not), the compelling interests that motivated Congress and that are served by the CPPA displace any such consideration.

The Respondents challenged the CPPA on grounds of overbreadth. But this Court has reserved the "strong medicine" of overbreadth, *Broadrick v. Oklahoma*, 413 U.S. 601, 613 (1973), to those few instances where the overbreadth of an enactment is both real and substantial. As explained in Argument II, the CPPA has a plainly legitimate scope, and Congress has chosen entirely proper means to the end of eliminating child pornography, means that do not sweep too broadly.

Nor is there any merit to the Respondents' vagueness argument. *See* Argument III, *infra*. The statutory phrases, "appears to be" and "conveys the impression," provide "sufficient definiteness" for men of common understanding to know what conduct is prohibited, *Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Moreover, the CPPA imposes a requirement of scienter that serves to further secure from wrongful prosecution any individual whose creation of, acquisition of, distribution of, or use of, child pornography was, in any constitutionally significant sense, *innocent*.

Finally, as explained in Argument IV, the Ninth Circuit erred when it subjected the CPPA to strict scrutiny. The court below failed to comprehend the significance of this Court's

determination in *Ferber* that child pornography falls outside the scope of the First Amendment's protections. Consequently, the court below erred because it accorded constitutional deference to a form of communication that was entitled to none.

ARGUMENT

I. VIRTUAL CHILD PORNOGRAPHY IS OUTSIDE THE SCOPE OF THE FIRST AMENDMENT

A. The Protection of Children is an Interest of the Highest Importance

Congress has concluded that protecting children from the harms associated with the production and use of child pornography is an interest of the highest order. This Court has also acknowledged that the interest identified by Congress is compelling. "It is evident beyond the need for elaboration" that the government has a compelling interest in "safeguarding the physical and psychological well-being of a minor." *Ferber*, 458 U.S. at 756-57 (quoting *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 607 (1982)). Further, "[a] democratic society rests, for its continuance, upon the healthy, well-rounded growth of young people into full maturity as citizens." 458 U.S. at 757 (quoting *Prince v. Massachusetts*, 321 U.S. 158, 168 (1944)). "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance." 458 U.S. at 757.

This Court has sustained laws protecting the psychological and physical well-being of children "even when the laws have operated in the sensitive area of constitutionally protected rights." *Id. See, e.g., Osborne v. Ohio*, 495 U.S. 103 (1990) (Ohio statute proscribing the mere possession and viewing of child pornography); *Ginsberg v. New York*, 390 U.S. 629 (1968) (New York law protecting children from exposure to nonobscene pornography); *FCC v. Pacifica*, 438 U.S. 726

(1978) (regulation of indecent but nonobscene radio broadcasts to protect children).

B. Virtual Child Pornography is Indistinguishable from Standard Child Pornography

There is no dispute that the CPPA is intended to eliminate a form of child pornography that is the virtual twin of the child pornography addressed by this Court in *Ferber* and *Osborne*. In *Ferber*, this Court sustained New York's prohibition targeted at materials that "visually depict sexual conduct by children below a specified age." 458 U.S. at 764. The CPPA proscribes the same imagery. The CPPA regulates only those sexually explicit images "which are virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct." S. Rep. No. 104-358, at pt. I, IV(B) (1996). The Act "applies to the same type of photographic images already prohibited, but which does not require the use of an actual minor in its production." *Id.* at pt. IV(C).

Thus, Congress has simply adjusted child pornography laws to deal with the permutations of the modern computer age. The images proscribed, however, have remained virtually unchanged. Indeed, as noted above, Congress intended the CPPA to reach images that, but for the technological advances giving rise to their creation, were already proscribed by law. The *virtual* images to which Congress directed the CPPA are indistinguishable from those regulated by pre-CPPA law.

In *Ferber*, this Court held that "child pornography . . . like obscenity, is unprotected by the First Amendment." 458 U.S. at 764. The value of such expression is "exceedingly modest, if not *de minimus*." *Id.* at 762. Thus, child pornography falls within one of the well-known categories of expression that are outside the scope of the First Amendment. *Id.* at 764. Such

categories – obscenity, fighting words, libel, and here, child pornography – may be "regulated because of their constitutionally proscribable content." *R.A.V. v. St. Paul*, 505 U.S. 377, 383 (1992). Since its content is indistinguishable from, and indeed is identical to, standard child pornography, *virtual* child pornography lies properly within the same category of unprotected speech.

C. Even If Virtual Child Pornography Does Enjoy Some Degree of Protection, the Interests Supporting Its Elimination Far Outweigh Any Arguments in Its Favor

Assuming *arguendo*, that virtual child pornography enjoys some degree of First Amendment protection – it does not – the surpassing interests supporting its elimination far outweigh any conceivable interests to legalize it. In a similar context involving standard child pornography, this Court observed in *Osborne*: "assuming, for the sake of argument," that there are any "First Amendment interest[s] in viewing and possessing child pornography . . . the interests underlying child pornography prohibitions far exceed the interest justifying" any claim to protected status. *Osborne*, 495 U.S. at 108. The principle articulated in *Osborne* is equally applicable here.

There are at least five compelling interests that support Congress' enactment of the CPPA as a means to restrict virtual child pornography. Each of these reasons readily outweighs any putative interest of distributors or recipients of virtual child pornography.

a. Virtual Child Pornography is Used to Seduce Children into Sexual Conduct

The CPPA is necessary to prevent pedophiles from using child pornography to seduce children into sexual activity. In part, Congress was prompted to enact the CPPA because

"[c]hild pornography is often used as part of a method of seducing . . . children into sexual activity." *See* Congressional Findings Section 101(a). Indeed, the use of child pornography by pedophiles to seduce children into sexual activity is not subject to serious dispute. *See* Attorney General's Comm. on Pornography, Final Report at 649 (1986); Child Pornography Prevention Act of 1995: Hearing on S. 1237 Before the Senate Comm. on the Judiciary, 104th Cong. 16 (1996) (Statement of Dr. Victor Cline). This Court acknowledged in *Ferber*, "[t]he distribution of photographs and films depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children," 458 U.S. at 759, and in *Osborne*, "that pedophiles use child pornography to seduce children into sexual activity," 495 U.S. at 111. Because it is "indistinguishable" from standard child pornography, *virtual* child pornography can be used the same way and have the "same seductive effect" on children. *See* Senate Hearing at 70.

The Ninth Circuit below erred in trivializing this interest. While this Court in *Ferber* found it unnecessary to discuss the point in depth, it affirmatively found that such materials are in fact "intrinsically" related to sexual abuse of children. 458 U.S. at 759. Further, eight years after *Ferber*, in *Osborne*, this Court specifically found that "encouraging the destruction of these materials is . . . desirable because evidence suggests that pedophiles use child pornography to seduce children into sexual activity." *Osborne*, 495 U.S. at 111.

b. Virtual Child Pornography Serves as a Catalyst for Pedophiles in the Sexual Abuse of Children

In enacting the CPPA, Congress found that virtual child pornography serves as a catalyst that "stimulates" and "inflames" pedophiles into sexual abuse of children by "whet[ting] their own sexual appetite and as a model for sexual

acting out with children." *See* Cong. Findings §101(a)(4). Testimony before Congress on the CPPA suggested that virtual child pornography has the same effect on pedophiles as ordinary child pornography. Senate Hearing at 38 and 92.

c. Eliminating Virtual Child Pornography is Necessary to Allow Enforcement of Child Pornography Laws Against Child Pornography Using Actual Children

The CPPA is necessary to allow the effective enforcement of existing child pornography law. In enacting the CPPA, Congress found that the advent of virtual child pornography made it difficult, if not impossible, to distinguish computer generated images from actual photographic depictions of children engaging in sexual activity. 18 U.S.C. §2251 note (Supp. IV 1998) (Finding 6(A)) ("computer imaging technology" makes it impossible to determine if offending material was "produced using children").

Under pre-CPPA child pornography laws, the prosecution was required to prove that the pornographic image depicted a real child–an impossible task with the development of computer generated images. *Id.* A criminal defendant could always assert as a defense that the child depicted in a sexually explicit pose was virtual and not real. Such an assertion is virtually impossible to refute from an examination of the image itself. Thus, the CPPA was necessary to cure the inability to effectively enforce existing child pornography laws. And, as Congress found, the failure to criminalize virtual child pornography increases the danger to children from pedophiles and child pornographers because the risk of conviction and punishment is reduced. S. Rep. No. 104-358, at 20.

d. Eliminating Virtual Child Pornography is Necessary to Destroy the Market for Standard Child Pornography

The CPPA is a necessary measure in destroying the market for child pornography depicting actual children. In *Osborne*, this Court recognized that "[i]t is . . . surely reasonable for the State to conclude that it will decrease the production of child pornography if it penalizes those who posses and view the product, thereby decreasing demand." 495 U.S. at 109-10. Similarly in *Ferber* this Court recognized the legitimacy of a similar argument: "The advertising and selling of child pornography provide an economic motive for and are thus an integral part of the production of such materials, thereby decreasing demand." 458 U.S. at 761.

The legislative record on the CPPA contains testimony that persons who trade and sell images that are indistinguishable from those of actual children "keep the market of child pornography thriving." S. Rep. No. 104-358 at 91. This result obtains because pictures that look like children engaged in sexual activities can be exchanged for identical pictures that are of actual children engaged in the same activities. By eliminating the indistinguishable virtual images of children engaged in sexual conduct, the entire market of child pornography is reduced. *See* Cong. Findings, §101(a)(12) ("prohibiting the possession and viewing of child pornography will encourage the possessors of such material to rid themselves of or destroy the material, thereby helping to . . . eliminate the market for the sexual exploitive use of children").

e. Actual Children May Be Used in the Creation of Virtual Child Pornography

Real children may be used in the creation of virtual child

pornography. Indeed, a glaring deficiency of the Ninth Circuit's opinion below was its assumption that the creation of child pornography does not involve the use of real children. On the contrary, virtual child pornography can be created by morphing standard child pornography involving the photographing of real children in actual sexual conduct.[2] As the First Circuit observed in *United States v. Hilton*, "the material may have been created through the abuse of an actual minor but altered so that it may be impossible to show that a real child was ever involved in its creation." 167 F. 3d 61, 73 (1st Cir.), *cert. denied*, 120 S. Ct. 115 (1999). Under pre-CPPA child pornography law, the pedophile would likely escape criminal liability because of the impossibility of distinguishing virtual from standard child pornography.

II. THE CPPA IS NOT SUBSTANTIALLY OVERBROAD

The Respondents' overbreadth challenge to the CPPA's definition of virtual child pornography is misguided. The CPPA defines child pornography as any virtual depiction that "appears to be" or is promoted or distributed to "convey [] the impression that the material is . . . of a minor engaging in sexually explicit conduct." 18 U.S.C. 2256(8)(B), (D) (Supp. IV. 1998). While the divided panel of the Ninth Circuit

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2. *See* "Note: Free Speech Coalition v. Reno: Has the Ninth Circuit Given Child Pornographers a New Tool to Exploit Children?" 35 U.S.F.L.Rev. 109, 181 (2000) (explaining that after actual photographs are made, pedophiles can scan "them into a computer and alter the child's characteristics"). *And see* Cong. Findings, §101(6)("computer imaging technology can be used to . . . alter sexually explicit photographs, films, and videos in such a way as to make it virtually impossible for the unsuspecting viewers to identify the individuals").

considered this language problematic, the courts of appeal for the First, Eleventh, and Fourth Circuits have held that the language passes constitutional muster. *See Hilton*, 167 F. 3d at 72-73; *United States* v. *Mento*, 231 F.3d 912 , 921-922 (4th Cir. 2000); and *United States v. Acheson*, 195 F.3d 645, 650-652 (11th Cir.1999).

This Court has repeatedly emphasized that the overbreadth doctrine is "strong medicine" and must be used "sparingly and only as a last resort." *Broadrick*, 413 U.S. at 613. "When a federal court is dealing with a federal statute challenged as overbroad, it should . . . construe the statute to avoid constitutional problems if the statute is subject to such limiting construction." *Ferber*, 458 U.S. at 769 n.24; *Osborne*, 495 U.S. at 119 ("Courts routinely construe statutes so as to avoid the statutes' potentially overbroad reach"). Before a court invalidates a statute for overbreadth, the overbreadth "must not only be real, but substantial as well, judged in relation to the statutes plainly legitimate sweep." *Broadrick*, 413 U.S. at 615.

The Respondents erroneously assert that the "appears to be" language of the CPPA is too broad because it criminalizes speech accorded First Amendment protection. The CPPA, however, proscribes computer generated child pornography that is virtually identical to standard child pornography. Congress intended the CPPA to regulate narrowly only those visual depictions "virtually indistinguishable to unsuspecting viewers from unretouched photographs of actual children engaging in identical sexual conduct." S. Rep. No. 104-358, at pt. I, IV(B).

The "appears to be" language "applies to the same type of photographic images already prohibited, but . . . does not require the use of an actual minor in its production." *Id.* at pt. IV (C). By employing the phrase "appears to be," the Senate indicated that it was simply "extending [the prohibition against

child pornography] from photographic depictions of actual minors engaging in sexually explicit conduct to the identical type of depiction, one which is virtually indistinguishable from the banned photographic depiction." *Id.*; *and see Hilton*, 167 F.3d at 72. Because its application is limited to images that are "identical" to and "indistinguishable" from standard child pornography, any overbreadth argument must fail. For this reason, any concern that the CPPA could be applied against drawings, cartoons, sculptures, or paintings, is specious. *See Hilton*, 167 F.3d at 72.[3]

The Respondents have also raised the argument that the CPPA is susceptible to application against pornography that contains youthful appearing adults engaged in sex acts. This argument is undercut however by the fact that almost all prosecutions "under the 'appears to be a minor' provision would involve images of pre-pubescent children or persons who otherwise clearly appear to be under the age of 18." *Hilton*, 167 F.3d at 73. As Congress found, the market for such pornography is primarily composed of pedophiles, "who by definition have a predilection for pre-pubertal children." *Id.*; *see* S. Rep. No. 104-358, at sec. 2, pts. IV(A), (C). This argument is also flawed by its "inordinate focus on the arguably fuzzy line between age 17 and 18, a line which, as with many laws, must be drawn somewhere." *Hilton*, 167 F. 3d at 73.

In any event, the hypothetical possibility of application of

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3. Also contrast *Reno v. American Civil Liberties Union*, 521 U.S. 844 (1997), which invalidated an overbroad ban on "indecent" expression on the Internet on the grounds that such expression constitutes protected speech. The Court expressly preserved the government's right to prosecute the communication of obscenity or child pornography on the Internet. *Id.* at 877 n.44.

the CPPA in an impermissible context does not warrant invalidation. *See, e.g., Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (declining to invalidate all "hypothetical applications" of ordinance in resolving facial challenge). As this Court stated in *Ferber*, "We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application, and in that sense a requirement of substantial overbreadth is already implicit in the doctrine." 458 U.S. at 772.

Finally, any perceived overbreadth issues raised by Respondents are cured by the affirmative defenses of the CPPA. 18 U.S.C. §2252A(C)(Supp. IV 1998). Potential defendants are shielded from prosecution if the alleged child pornography was produced using "an actual person" who was an adult "at the time the material was produced," and the defendants did not "intentionally pander the material as being child pornography." *Id.*

III. THE CPPA IS NOT VAGUE

Respondents also assert that the CPPA's use of the phrases "appears to be" and "conveys the impression" are vague. Again, this assertion is misguided. To be sure, a statute must provide adequate notice of the activity it prohibits. The Constitution only imposes, however, "a requirement that the government articulate its aims with a *reasonable degree of clarity*." *Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984) (emphasis added). Thus, a statute will withstand a vagueness challenge if it "define[s] the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited, and in a manner that does not encourage arbitrary or discriminatory enforcement." *Kolender v. Lawson*, 461 U.S. 352, 357 (1983).

"Perfect clarity and precise guidance have never been

required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989). This Court has noted that some areas of expression are more sensitive than others because "a limited categorical approach has remained an important part of [] First Amendment jurisprudence." *R.A.V. v. St. Paul*, 505 U.S. at 383. "Sexually explicit images falling close to the line separating adult pornography and unprotected child pornography are outside the most sensitive areas of speech . . . ." *United States v. Acheson*, 195 F.3d at 652. As this Court explained in *Ferber*, legislators should be given "greater leeway" when acting to protect the well-being of children. 458 U.S. at 756.

Moreover, speculation about possible vagueness in hypothetical situations not before this Court cannot support a facial challenge when the law is valid "in the vast majority of its intended applications." *United States v. Raines*, 362 U.S. 17, 23 (1960). As this Court said in *Grayned v. City of Rockford*, 408 U.S. 104, 112 n.15 (1972), "[i]t will always be true that the fertile legal 'imagination can conjure up hypothetical cases in which the meaning of disputed terms will be in nice question.'" (quoting *American Communications Assn. v. Douds*, 339 U.S. 382, 412 (1950)). Respondents are possessed precisely of that "fertile legal imagination." But, as this Court has explained,

> We have never held that a statute should be held invalid on its face merely because it is possible to conceive of a single impermissible application. . . . Instead, in a facial challenge to the overbreadth and vagueness of a law, a Court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct.

Houston v. Hill, 482 U.S. 451, 458 (1987) (citations omitted). *See also Osborne*, 495 U.S. at 116 (sustaining conviction under

child pornography possession law that was "imprecise at its fringes"). Therefore, Respondents here cannot succeed in their vagueness challenge merely by showing the possibility of an impermissible application.

The Respondents contend that the use of the terms "appears to be of a minor"and "conveys the impression that the material contains. . . ." are subjective. Because we are "[c]ondemned to the use of words, we can never expect mathematical certainty from our language." *Grayned*, 408 U.S. at 110. In *Grayned*, this Court upheld the constitutionality of an anti-noise ordinance challenged for vagueness.[4] *Id.* at 107-108. The Court stated that "[t]he words of the [] ordinance are marked by flexibility and reasonable breadth, rather than meticulous specificity, but we think it is clear what the ordinance as a whole prohibits." *Id.* at 110 (citation omitted). The Court noted that a phrase taken from the ordinance such as "tends to disturb" or "adjacent" could, by itself, appear imprecise. Given the purpose of the ordinance ("for the protection of schools"), and its context (school grounds and activities), however, this Court concluded that the ordinance "clearly delineated its reach in words of common understanding." *Id.* at 110-112 (internal quotation omitted). Thus, even if a statutory phrase were imprecise, it would present no vagueness problems if its meaning can be tied to the context in which a given statute

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4. The anti-noise ordinance in *Grayned* provided the following:
[N]o person, while on public or private grounds adjacent to any building in which a school or any class thereof is in session, shall willfully make or assist in the making of any noise or diversion which disturbs or tends to disturb the peace or good order of such school session or class thereof . . . .
408 U.S. at 107-108.

operates. Such is the case here.

In *Ward v. Rock Against Racism*, this Court dismissed a facial challenge to city guidelines for the use of a band shell on the grounds of unbridled discretion. The city guidelines stated that their goals were to "provide the best sound for all events" and to "insure appropriate sound quality balanced with respect to nearby residential neighbors and the . . . quiet zone of [the area]." 491 U.S. at 794. This Court concluded, "[w]hile these standards are undoubtedly flexible, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Id.*

Likewise, in *Kovacs v. Cooper*, 336 U.S. 77 (1949), this Court rejected a vagueness challenge to an ordinance forbidding "loud and raucous" sound amplification. This Court observed, "[w]hile these are abstract words, they have through daily use acquired a content that conveys to any interested person a sufficiently accurate concept of what is forbidden." *Id.* at 79. Similarly, under the CPPA, any interested individual will know what is forbidden.

Neither is the CPPA subject to discriminatory enforcement. First, it is well settled that objective determinations based upon a person's appearance or actions are routinely accepted in the courts. *See*, *Liteky v. United States*, 510 U.S. 540, 553 n.2 (1994) (noting that recusal motions under 28 U.S.C. §455(a) are governed by "objective appearance of impartiality" test); *Ferber*, 458 U.S. at 751 (approved definition of child pornography banning "simulated" sexual conduct, which in ordinary usage means "to have or take on the appearance of"); *Miller*, 413 U.S. at 24 (obscenity law based on whether sexually explicit material appeals to a "prurient interest" and is "patently offensive" to an "average person").

A trier of fact must decide, based on the totality of the

circumstances, whether a reasonable unsuspecting viewer would consider the depiction to be of an actual individual under the age of 18 engaged in sexual activity. *See* S. Rep. No.104-358, at pt. IV(C); and 18 U.S.C. §2256; *also see Hilton*, 167 F.3d at 75. To prove this fact, the government may use the same type of evidence used before the CPPA came into effect. For example, in the case of pre-pubescent children, the government may show the trier of fact the actual pictures so that it may conclude whether the virtual image "appears to be" a minor. *See, e.g., United States v. Arvin*, 900 F. 2d 1385, 1390 n.4 (9th Cir. 1990) (citing a jury instruction that requires the jury to decide whether prepubescent girls are "minors" based upon their own "observations of the pictures"), *cert. denied*, 498 U.S. 1024 (1991). In cases involving images of minors that have reached puberty, expert witnesses may testify as to the physical development of the depicted persons, and as to their age. *Hilton*, 167 F.3d at 75; *Free Speech Coalition v. Reno*, 198 F.3d 1083, 1103 (9th Cir. 1999) (Fergusen, J., dissenting). Evidence may also be introduced as to how the distributor, creator, or possessor treated or labeled the material. *See, e.g., United States v. Robinson*, 137 F.3d 652, 653 (1st Cir. 1998)(noting that the pornographic photographs listed the ages of the boys depicted); *Hilton*, 167 F.3d at 75. *And see Pinkus v. United States*, 436 U.S. 293, 303-304 (1978) (the manner in which the pornography was created, promoted, or distributed is relevant in the determination of its unprotected status as obscenity).

Furthermore, the scienter requirement in the CPPA mitigates against any asserted vagueness concerns. This Court "has recognized that a scienter requirement may mitigate a law's vagueness." *Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982). Likewise, in *Boyce Motor Lines v.*

United States, 342 U.S. 337, 342 (1952), this Court upheld a law regulating the transporting of explosives because a "[scienter] requirement . . . does much to destroy any force in the argument that application of the Regulation would be so unfair that it must be held invalid." Under CPPA, the government must prove beyond a reasonable doubt that an individual "knowingly" possessed the child pornography. 18 U.S.C. §2252A(a)(5)(B). Indeed, the government must prove that the individual purposefully acquired or distributed the material, and that he did so believing that the material was sexually explicit in nature, and that it depicted an image of a person who appeared to him to be under 18 years of age. *See United States v. X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) (child pornography scienter requirement "extends to both the sexually explicit nature of the material and the age of the performers").[5]

This Court's analysis in *Hoffman Estates* also proves helpful. *Hoffman* involved a civil ordinance, but the Court termed it "quasi-criminal" and applied a "relatively strict test,"

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5. Contrast the unconstitutional anti-loitering ordinance this Court invalidated in *City of Chicago v. Jesus Morales*, 527 U.S. 41 (1999). That ordinance, which could not be saved by a narrowing construction, made it a crime to "loiter" "with no apparent purpose." After recognizing the constitutional right of persons to "remain in a public place," this Court held the ordinance fatally defective because it omitted any *scienter* requirement, and because it was impossible for any persons to "know if he or she" was "standing in a public place" without any "apparent purpose." *Id.* at 57. This open-ended language was "vague 'not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all.'" *Id.* at 60 (quoting *Coates v. Cincinnati*, 402 U.S. 611, 614 (1971)).

which the ordinance survived. 455 U.S. at 499. The law required licensing for anyone selling "any items . . . designed or marketed for use with illegal [] drugs." *Id.* at 500. The Court found that the challenged words "designed or marketed for use" were "sufficiently clear." *Id.* at 503. This was because the ordinance and administrative guidelines in effect required a license if a store "display[ed] its wares in a manner that encourage[d] illegal drug use." *Id.* at 502. The *Hoffman* Court also found a scienter requirement in the law since one could "scarcely market items for a particular use without intending that use." *Id.* Finally, the Court noted that although specific future applications could engender constitutional problems, it would consider such problems when they arose. *See id.* at 504.

Likewise, the statute in this case is similar in certain aspects to the anti-drug law upheld in *Hoffman*. The anti-drug ordinance prohibited marketing certain items for use with illegal drugs even if those items could be used for other legitimate purposes. This Court looked to the market that the vendor was targeting. Similarly, the CPPA prohibits marketing images as child pornography even if those images were made using youthful-looking adults. Thus, like the ordinance in *Hoffman*, the CPPA withstands a vagueness challenge, and any possible misapplications of it should be addressed in the future if they arise.[6]

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6. Another reason why the vagueness challenge should rejected in this case is provided by the rule of limiting construction for criminal statutes, the so-called "junior version of the vagueness doctrine." *United States v. Lanier*, 520 U.S. 259, 266 (1997). As the *Grayned* Court noted, "vague laws may trap the innocent by not providing fair warning." 408 U.S. at 108. According to *Lanier*, one of the three "related manifestations of [] fair warning" is "this canon of strict construction of criminal statutes affecting protected speech activities, or rule of lenity," which "ensures fair warning by so resolving ambiguity in a criminal statute as to apply it only to conduct clearly covered." 520 U.S. at 266. "The touchstone is whether the statute, either [alone or as construed], made it reasonably clear at the time of the charged conduct that the conduct was criminal." *Id.* at 267. If so, the statute will be found to give adequate warning and thus comply with due process, as the Court found in *Lanier*. 520 U.S. at 266 (upholding a conviction under a statute prohibiting "the deprivation of any rights . . . secured . . . by the Constitution" and rejecting a "fair warning" challenge). Thus, this statue withstands a vagueness challenge because it allows for limiting construction by the courts on a case by case basis so as to proscribe only the conduct clearly covered.

Finally, with regard to "real" depictions involving young-looking persons of indefinite age, the CPPA provides an affirmative defense to sellers, distributors, and producers who can provide proof of the participants' age. 18 U.S.C. §2252(A)(c).

Based on these requirements and safeguards, any assertion that the CPPA is subject to arbitrary or discriminatory enforcement is misplaced.

IV. THE NINTH CIRCUIT ERRED IN USING A STRICT SCRUTINY STANDARD

Strict scrutiny analysis applies only when the government engages in content based discrimination against a *protected* category of expression. *R.A.V.*, 505 U.S. at 377. Despite the fact that child pornography is an *unprotected* category of expression, the Ninth Circuit erroneously employed this standard in its consideration of the CPPA. The appellate court would have been better directed to have adopted the same analysis used by the Court in *Ferber* and *Osborne* where this Court did not employ strict scrutiny analysis. Even if strict

scrutiny analysis is used, however, the CPPA passes constitutional muster. *See Boos v. Barry*, 485 U.S. 312 (1988)(content based restrictions on protected expression must be narrowly drawn to serve a compelling governmental interest).

As discussed in Argument I, *supra*, Congress identified at least five compelling government interests advanced by the regulations contained in CPPA: (1) virtual child pornography is used to seduce children into sexual conduct; (2) virtual child pornography serves as a catalyst by stimulating pedophiles; (3) eliminating virtual child pornography is necessary to effectuate enforcement of child pornography laws that do in fact involve actual children engaging in sexual conduct; (4) eliminating virtual pornography is necessary to destroy the market in standard child pornography; and (5) actual children may be used in the creation of virtual child pornography. In *Osborne*, this Court explicitly approved at least two of these governmental interests: eliminating child pornography because pedophiles and would be child abusers use it to seduce children; and to stamp out the market for the production of child pornography. 495 U.S. at 109-111. Furthermore, in *Ferber*, this Court explicitly recognized that the distribution of materials "depicting sexual activity by juveniles is intrinsically related to the sexual abuse of children." 458 U.S. at 759. At bottom, the government interests advanced by CPPA are no less powerful than the interests advanced by laws designed to stamp out standard child pornography since both forms of child pornography involve the sexual abuse of children. And, as the Court observed in *Ferber*, this interest "constitutes a government objective of surpassing importance." *Id.* at 757.

Finally, as discussed in Argument II, *supra*, the approach to *virtual* child pornography taken by Congress in its enactment

of the CPPA is not overbroad, but narrowly tailored to advance these compelling governmental interests. Indeed, the CPPA is limited in its application to a form of child pornography that is "indistinguishable" from and virtually "identical" to standard child pornography.

CONCLUSION

For all the foregoing reasons, the judgment below should be reversed.

Respectfully submitted,

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